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Spherion Atlantic Enterprises, LLC sued herein as
Spherion Pacific Workforce, LLC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

VALERIE D. WATSON-SMITH, AND ALL
OTHER SIMILARLY SITUATED,

Plaintiff,

v.

SPHERION PACIFIC WORKFORCE, LLC,
and DOES 1 through 100, inclusive

Defendant.

Case No. C 07 05774 JSW

**DEFENDANT SPHERION ATLANTIC
ENTERPRISES, INC.'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
PLAINTIFF'S MOTION FOR AWARD
OF SANCTIONS**

Date: September 24, 2008

Time: 3:00 p.m.

Courtroom: 4

Judge: Hon. Wayne D. Brazil

I. INTRODUCTION

Plaintiff may only be awarded her fees and costs if defendant's position in opposing the discovery at question was not "substantially justified." Defendant objected to the discovery requests at issue for two reasons. First, the discovery is hopelessly broad and would cost

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1 Spherion over one-half million dollars to gather. Second, the discovery seeks information that
 2 Spherion has a duty to protect under California's privacy laws. Clearly, both positions are
 3 substantially justified. Therefore, plaintiff's motion should be denied.

4 Plaintiff seeks information related to a state-wide putative class of diverse and varied
 5 employees, a class that presumptively is not appropriate for certification. Defendant estimates it
 6 would cost over \$580,000 to gather the information requested by plaintiff. Given the incredible
 7 burden to defendant and the unlikely prospect of certification of such a broad and diverse class,
 8 defendant objected to the oppressive requests.

9 Plaintiff's other category of discovery requests seeks private contact information related
 10 to Spherion Cisco recruiters. Although the putative class as defined for these requests is much
 11 narrower, plaintiff unconditionally demanded that names, addresses and other personal
 12 information be turned over, without the putative class members even having the opportunity to
 13 object to their information being disclosed. True to its duty to protect the privacy of its current
 14 and former employees, defendant objected to the unconditional disclosure, and instead suggested
 15 a method of disclosure which would give putative class members the opportunity to object.
 16 Plaintiff rejected defendant's compromise.

17 There is no question defendant's objections to discovery and opposition to the motion to
 18 compel are substantially justified.

19 **II. ARGUMENT**

20 Federal Rule of Civil Procedure 37 provides that if a party prevails on a motion to
 21 compel, the Court must require the losing party to pay the moving party's expenses, including
 22 attorney's fees. FED. R. CIV. PROC. 37(a)(5)(A). However, the Court *must not* order the payment
 23 if "the opposing party's nondisclosure, response, or objection was substantially justified." *Id.* at
 24 37(a)(5)(A)(ii).

25 The conduct of a party is "substantially justified" if the objections and opposition raise
 26 issues about which there is a genuine dispute, or if reasonable people could differ as to the
 27 appropriateness of the contested action. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) ("We
 28

are of the view, therefore, that as between the two commonly used connotations of the word 'substantially,' the one most naturally conveyed by the phrase before us here is not 'justified to a high degree,' but rather 'justified in substance or in the main' -- that is, justified to a degree that could satisfy a reasonable person.") Specifically, a "party's actions are substantially justified if the issue presented is one that 'could engender a responsible difference of opinion among conscientious, diligent[,] but reasonable advocates.'" *Peterson v. Hantman*, 227 F.R.D. 13, 15 (D. D.C. 2005).

Case law supports defendant's position here that its objections and opposition were and are "substantially justified." See, e.g., *Maddow v. Proctor & Gamble Co. Inc.*, 107 F.3d 846, 853 (11th Cir. 1997) (counsel substantially justified in relying on Supreme Court dictum and out of circuit case law when there was no controlling authority in the circuit); *Frazier v. Southeastern Pennsylvania Transportation Authority*, 161 F.R.D. 309, 313 (E.D. Pa. 1995) (position justified when, although unconvincing, "not completely without basis in the law"); *Warzon v. Drew*, 155 F.R.D. 183, 187-88 (E.D. Wisc. 1994) (substantial justification found when no clear and controlling precedent to the contrary); *T.N. Taube Corp. v. Marine Midland Mortgage*, 136 F.R.D. 449, 456 (W.D. N.C. 1991) (unclear question; position justified); *Sneirson v. Chemical Bank*, 108 F.R.D. 159, 163 (D. Del. 1985) (given recognition of right to privacy in other contexts, assertion as to financial records substantially justified); *Cullins v. Heckler*, 108 F.R.D. 172, 177 (S.D.N.Y. 1985); *In re Dayco Corp. Derivative Securities Litigation*, 99 F.R.D. 616, 626 (S.D. Ohio 1983) (difficulties of legal and factual issues and excellent memoranda submitted rendered parties' positions substantially justified); *Smith v. Montgomery County*, 573 F. Supp. 604, 614 (D. Md. 1983) (substantial privacy grounds for resistance to discovery).

This is not a case, on the other hand, where defendant's position was not substantially justified: *Pearce v. Club Med Sales, Inc.* 172 F.R.D. 407, 411 (N.D. Cal. 1997) (position not substantially justified when vast bulk of legal authority was against it); *General Motors Corp. v. Johnson Matthey, Inc.*, 887 F. Supp. 1240, 1245 (E.D. Wisc. 1995) (position not substantially justified when based on misrepresentation of case); *Harp v. Citty*, 161 F.R.D. 398, 403 (E.D.

1 Ark. 1995) (expenses awarded when counsel had time to research law and change position and
2 did not do so); *White v. Beloginis*, 53 F.R.D. 480 (S.D.N.Y. 1971) (general objections
3 unjustified).

4 Federal law is clear that unabated class-wide discovery should not be permitted unless the
5 proponent of the class can make at least a threshold showing that class certification requirements
6 can be satisfied. *Mantolete v. Bolger*, 767 F.2d 1416, 1424 (9th Cir. 1985); *Doninger v. Pacific*
7 *Northwest Bell*, 564 F.2d 1304, 1312-13 (9th Cir. 1977). This is particularly true when the
8 potential expense of the information gathering exercise becomes totally out of proportion with
9 the likelihood that admissible evidence will be discovered. Here, plaintiff presented no evidence
10 whatsoever that she will be able to certify a state-wide class of Spherion employees, yet pursues
11 discovery requests that will cost Spherion over \$580,000. Spherion's opposition to this fishing
12 expedition certainly was justified.

13 Moreover, plaintiff demanded that Spherion unconditionally disclose private contact
14 information for a group of current and former employees, without protecting the employees'
15 Constitutional right to privacy. Case law is clear in California that individuals have a right to
16 privacy under the California Constitution that protects their personal information from
17 disclosure. Defendant suggested to plaintiff that the putative class members be notified that their
18 information would be disclosed unless they objected to the disclosure, but plaintiff would not
19 agree to this process. Clearly, under *Sneirson* and *Smith, supra*, defendant is substantially
20 justified in opposing the disclosure of this information based on these individuals' right to
21 privacy.

22 Alternatively, if the court should grant in part and deny in part Plaintiff's motion to
23 compel here, each party should bear its own costs and attorneys' fees. *See Pulsecard, Inc. v.*
24 *Discover Card Services Inc.*, 168 F.R.D. 295, 311 (D. Kan. 1996) (finding that where the court
25 sustained in part and overruled in part plaintiff's motions to compel discovery, justice required
26 that each party be responsible for its own costs incurred on such motions).

1 **III. CONCLUSION**

2 For the reasons set forth above, defendant respectfully requests that the Court deny
3 plaintiff's motion for award of sanctions.

4 DATED: September 3, 2008

SEYFARTH SHAW LLP

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7 By /s/ Alfred L. Sanderson, Jr.

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